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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. 252

UNIVERSAL MANUFACTURING COMPANY, a corporation, and REUBEN BERKOWITZ, and BERTHA BERKOWITZ, individually and as officers of UNIVERSAL MANUFACTURING COMPANY, and JOSEPH BERKOWITZ,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Press, Inc.—ANdover 3-6850

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vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Universal Manufacturing Company, Reuben Berkowitz, Bertha Berkowitz, and Joseph Berkowitz, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered May 13, 1953. This case was before the Circuit Court on petition to review an order of the Federal Trade Commission. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A. Sec. 347). This case is reported in 204 F. (2) 272. The opinion is set out R. 23.

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

There is now pending in this Court the petition of Bernice Feitler and Irwin Feitler for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Feitler* v. *Federal Trade Commission* No. 804. The issues and questions involved in that case are almost identical with the instant case; therefore, we think the two decisions should be considered together.

The complaint herein charged in substance that petitioners manufacture, sell and distribute in interstate commerce devices known as push cards and punch boards, jar games and spindle games; that these devices are prepared so as to involve games of chance or lottery schemes when used in intrastate commerce to distribute merchandise to the consuming public; that many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing merchandise by means of these lottery devices; that the petitioners thus supply to, and place in the hands of others the means and instrumentalities of engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act; and that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair acts and practices within the intent and meaning of said act.

Petitioners' answer admitted all of the material allegations of the complaint.

The Commission after making findings of fact entered the following order: "It is ordered that respondents * * * do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punch boards, jar games, or other lottery devices which are to be used or which, due to their design, are suitable for use in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

The Court issued the following order:

> "On the authority of *Gay Games, Inc.*, v. *Federal Trade Commission*, 10 cir., 204 F. 2d 197, decided April 14, last, the order of the Commission is Affirmed and judgment will be entered enforcing such order in accordance with the provisions of 15 U. S. C. A. 45(c)."

The following is the material portions of the decision in the *Gay Games* Case: "Two propositions of law which control the disposition of this case are now well established by the adjudicated cases. They are: (1) The practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery is contrary to the established public policy of the United States;[2] and (2) Persons who sell and distribute, in interstate commerce, devices designed for the purpose of selling merchandise by games of chance or lottery, and thereby aid, abet, and induce manufacturers and wholesale and re-

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[2] Federal Trade Commission v. Keppel & Bro., Inc., 291 U.S. 304, 313; Zitserman v. Federal Trade Commission, 8 Cir., 200 F. 2d 519, 222; Globe Cardboard Novelty Co. v. Federal Trade Commission 3 Cir., 192 F. 2d 444, 446;
Modernistic Candles v. Federal Trade Commission, 7 Cir., 145 F. 2d 454, 455;
See also Maltz v. Sax, 7 Cir., 134 F. 2d 2, 4.

tail dealers in merchandise to use either unfair or deceptive acts or practices or unfair methods of competition, are engaged in practices contrary to the public policy of the United States and violative of the Federal Trade Commission Act.[3]

"The devices here involved were designed for the specific purpose of selling merchandise by game of chance or lottery. The acts and practices of Games, Inc. and Noel aid, abet and induce manufacturers and wholesalers to distribute merchandise packed and assembled with such devices and aid, abet and induce retail dealers to engage in the sale of merchandise by game of chance or lottery and thus aid, abet and induce unfair and deceptive acts and practices and unfair methods of competition, adversely affecting interestate commerce and commerce in the District of Columbia.

"We conclude that the acts and practices of Games, Inc. and Noel are violate of the Federal Trade Commission Act and within the power of the Commission to prohibit.

Games, Inc., and Noel answer that the order is broader than the complaint and urge modification thereof. A like contention with respect to similar orders has been considered by a number of the courts. See: *Consolidated*

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[3] **Chas A. Brewer & Sons v. Federal Trade Commission, 6 Cir., 158 F. 2d 74, 77-79;**
Zitserman v. Federal Trade Commission, 8 Cir., 200 F. 2d 519, 522, 523;
Consolidated Mfg. Co. v. Federal Trade Commission, 4 Cir., 199 F. 2d, 417, 418;
Globe Cardboard Novelty Co. v. Federal Trade Commission, 6 Cir., 192 F. 2d, 454, 455;
Lichtenstein v. Federal Trade Commission, 6 Cir., 194 F. 2d, 444, 446, 447;
Modernistic Candies v. Federal Trade Commission, 7 Cir., 145 F. 2d, 454, 455;
Feitler v. Federal Trade Commission, 9 Cir., ... F. 2d ....., (decided January 28, 1953).

Mfg. Co. v. *Federal Trade Commission*, 4 Cir., 199 F. 2d 417, 418; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 3 Cir., 192 F. 2d 444, 447, and cases there cited.

"We construe the order to prohibit only the distribution, in interstate commerce, of any push card, punch board or other device which is designated to serve as an instrumentality for the sale of articles of merchandise by lottery methods. So construed, the order is freed from objection.

"The order of the Commission is affirmed and judgment will be entered by this court enforcing it in accordance with the provisions of 15 USCA 45 (c)."

QUESTIONS PRESENTED

I.

Can there be under our dual system of government a Federal public policy as to intrastate transactions which have absolutely no effect on interstate commerce?

II.

Can the Federal Circuit Court of Appeals create and legislate a Federal public policy as to intrastate transactions when there is no such public policy created or contained in the Constitution or in any act of Congress?

III.

Is the principle of *De minimus no curat lex* applicable to the Federal Trade Commission Act?

IV.

Is an act, method or practice which is neither unfair to competition or purchasers and has no effect upon merchandising competition or upon the trade in the same kind of merchandise by other means, an unfair act, method or practice within the intent and meaning of the Federal Trade Commission Act?

V.

Has the Commission jurisdiction to restrain the selling and distributing of a commodity or is its jurisdiction limited to the restraining of unfair methods, acts or practices which are used to sell the products, that is, limited to restraining unfair marketing methods?

VI.

Is this proceeding in the interest of the public as required by the Federal Trade Commission Act?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

The Court in holding that acts which are against public policy are unfair decided a federal question in a way probably in conflict with applicable decisions of this Court.

II.

As the reasons relied upon for the allowance of the writ in the case at bar are in substance identical with those relied upon in the *Feitler* v. *Federal Trade Commission*, Docket No. 804, it seems to petitioners that it would be more convenient to the Court not to repeat each reason advanced, but just to refer the Court to pages eight, nine,

ten and eleven of the petition for a writ of *certiorari* in the *Feitler* case and by reference to all of the reasons, therein set out, relied for the writ incorporate them herein and make them a part of this petition as though they were set out *verbatim*.

It is respectfully submitted that a writ of *certiorari* should issue in the matter.

PHINEAS ROSENBURG,
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Attorney for Petitioners.

F. W. JAMES,
Of Counsel.

IN THE

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OCTOBER TERM, A. D. 1953

No.

UNIVERSAL MANUFACTURING COMPANY, a corporation, and REUBEN BERKOWITZ, and BERTHA BERKOWITZ, individually and as officers of UNIVERSAL MANUFACTURING COMPANY, and JOSEPH BERKOWITZ,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This case comes before the Court on a petition for Certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit wherein an order to cease and desist issued by the Federal Trade Commission against petitioners based on Sec. 5 of the Federal Trade Commission Act, 52 Stat. 11, 15 U.S.C.A. Sec. 45 was affirmed. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A., Sec. 347).

STATEMENT OF THE CASE.

The following statement contains all that is material to a full consideration of the questions presented.

The allegations of the complaint which are material herein are in substance; that petitioners ship only punch boards, push cards, jar games and spindle games (no other merchandise); that when retailers use the boards to distribute merchandise, which merchandise they had secured from other sources, the merchandise is sold or distributed by chance, that such use of the devices encourages the public to gamble.

Petitioners' answer admits the allegations of the complaint.

After making finding of facts the Commission issued the following order; It Is Ordered that the respondents (petitioners herein) do forthwith cease and desist from:

> "Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, jar games, spindle games, or other lottery devices which are to be used or which due to their design, are suitable for use in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme."

The Circuit Court of Appeals affirmed the order. The material part of the opinion is set out *Supra* P. 3, 4 and 5.

SPECIFICATION OF ERRORS INTENDED TO BE ARGUED.

For the convenience of the Court the petitioners refer to, incorporate herein, and make a part of this brief as though they were set *in toto* all of the Specification of Errors as set out on pages fifteen and sixteen in the brief in the *Feitler Docket No. 804.*

SUMMARY OF ARGUMENT.

The petitioners refer to, incorporate herein, and make a part of this brief as though they were set *in toto* the summary of argument as set out on pages sixteen, seventeen, and eighteen in the brief in the *Feitler Docket No. 804.*

ARGUMENT.

As this case and the case of *Feitler* v. *Federal Trade Commission Docket No. 804* should be considered together, it seems to petitioners that it would be to the convenience of the Court not to repeat what is set out in the argument in the brief and reply brief in the *Feitler* case. Therefore the petitioners herein refer to the argument in the said *Feitler* case commencing on page 19. Therefore, the petitioners refer to, incorporate and make a part of this brief as though it were herein set out *in toto* the entire argument commencing on page nineteen of the brief in the *Feitler* case. Also the petitioners herein refer to and incorporate herein and make a part hereof as though set out *in toto* the entire reply brief filed in the *Feitler* case *Docket No. 804.*

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

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Evanston, Ill.
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In the Supreme Court of the United States

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v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 23) is reported in 204 F. 2d 272.

JURISDICTION

The decree of the Court of Appeals was entered on June 9, 1953 (R. 23–25). The petition for a writ of certiorari was filed on August 11, 1953.

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The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the interstate sale and distribution of devices which are used by the ultimate purchasers in selling merchandise at retail by means of games of chance constitute unfair acts or practices under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

DISCUSSION

A complaint issued by the Federal Trade Commission (R. 4) charged petitioners with unfair acts and practices in commerce, in violation of

Section 5 of the Federal Trade Commission Act. The gravamen of the complaint was the interstate distribution of various devices (push cards, punchboards, jar games and spindle games) designed for ultimate use by retail merchants as a means of selling merchandise through the conduct of games of chance. The facts, which are fully admitted, are summarized in the petition (p. 2). The Commission's cease and desist order (R. 20) was affirmed by the Court of Appeals in a brief *per curiam* opinion.

Petitioners state that they have no arguments to urge other than contentions which are raised in a similar case, *Feitler, et al.* v. *Federal Trade Commission,* No. 74, this Term, pending on petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit.* They incorporate by reference the specifications of error and argument advanced by petitioners in that case.

The Federal Trade Commission has previously filed a brief in opposition in No. 74, stating fully its reasons for believing that the petition in that

*The only material difference between the two cases is that petitioners in No. 74, in addition to making various legal arguments concerning the scope of the Commission's powers, urge that they did not obtain a fair hearing. That contention is not open to petitioners in the instant case, since they admitted all material allegations in the complaint and waived a hearing (R. 11).

case should be denied. For the reasons stated in that brief, to which we respectfully refer the Court, we urge that the petition in the instant case should likewise be denied.

Respectfully submitted,

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Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
LAWRENCE GOCHBERG,
Special Assistant to the Attorney General.
EARL W. KINTNER,
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Federal Trade Commission.

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FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petition for Rehearing

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vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

PETITION FOR REHEARING.

This petition is based upon the ground that the opinion in the Court below violates all of rules of statutory construction announced by this Court.

These petitioners refer to the Petition for Rehearing filed in this Court in the case of *Feitler* v. *Federal Trade Commission No. 74,* and incorporate herein and make a part of this Petition for Rehearing as though set out *in toto* herein all that is stated in said Petition for Rehearing.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to it for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

J. L. London,
Attorney for Petitioners.

F. W. James,
Phineas Rosenberg,
Of Counsel.

CERTIFICATE.

Comes now the undersigned, one of the attorneys for the petitioners herein and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that his Petition is restricted to a ground available to the petitioners although not previously presented.

F. W. James.